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No. 695

In the Supreme Court of the United States

OCTOBER TERM, 1951

JOHN VANCE TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The District Court's opinion on the motion to suppress the evidence and to quash the indictment appears at R. 16–19. The opinion of the Circuit Court of Appeals (R. 32–36) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 13, 1932. (R. 37.) The petition for certiorari was filed February 11, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The only question presented is whether the trial court erred in refusing to exclude evidence procured through a search of petitioner's garage without a search warrant. We submit that this Court is not in a position to review this question as, so far as the record shows, the bill of exceptions containing the evidence was filed out of time.

STATEMENT

Petitioner was indicted in the United States District Court for the District of Maryland for the possession of 122 cases (732 gallons) of whiskey in violation of the National Prohibition Act, the indictment charging two prior convictions of the offense of possession. (R. 1–3.)

While the chronology of subsequent events is not very clear, it appears that immediately prior to trial, petitioner filed a motion to suppress the evidence and to quash the indictment on the ground that the search and seizure on which the evidence and indictment were based were illegal. (R. 4–5.) A hearing was had on the motion, at which time evidence was introduced by the Government. No evidence was offered by petitioner. At the close of the Government's evidence, the petitioner renewed his motion to exclude the evidence. (R. 9–16.) The motion was overruled, an oral opinion being rendered, and an exception was noted by petitioner. (R. 16–19.)

Following a trial to the court without a jury, petitioner was found guilty as charged in the indictment, and sentenced to three months' imprisonment in jail and to pay a fine of $750. (R. 7.) On appeal to the Circuit Court of Appeals the judgment was affirmed. (R. 36–37.)

ARGUMENT

The question presented is one which depends peculiarly upon a consideration of the evidence. As we contend that the evidence is not properly before this Court because, so far as the record shows, the bill of exceptions containing the evidence was allowed and filed out of time and that it is, therefore, unnecessary for this Court to consider the question urged, we will discuss only the timeliness of the bill of exceptions.

In a "memorandum" appearing in the Record (R. 7) it is stated that the "Verdict was rendered in this case on the 12th day of February, 1931, and Judgment was rendered on the same day." Other portions of the record indicate that the correct date of the verdict and judgment was February 19, 1931. See, for example, "Motion to suppress evidence and quash indictment and order of court overruling same" (R. 4) and "Agreement of parties waiving trial by jury" (R. 7), all of which were filed on February 19, 1931. The record also shows that the petition for appeal and order granting the appeal were dated or filed February 19, 1931 (R. 28), and it likewise appears that petitioner was admitted to

bail on that date pending his appeal to the Circuit Court of Appeals (R. 8). Taking the date most favorable to the petitioner, we will, therefore, assume that the verdict and judgment were entered on February 19, 1931. Section 86 of the Judicial Code, as amended by the Act of March 3, 1925, c. 422, 43 Stat. 1106 (U. S. C., Title 28, Sec. 166), provides that terms of the District Court for Maryland shall be held at Baltimore on the first Tuesdays in March, June, September, and December. The petitioner was indicted and tried in Baltimore (R. 1). The verdict and judgment were therefore rendered during the December term of the District Court which, under Section 86, Judicial Code, expired at the commencement of the March term on March 3, 1931. But it is provided in Rule 39 of the Rules of the District Court for Maryland that—

> Bills of Exceptions may be signed in any cause at any time within thirty days from the rendition of the verdict of the jury or the findings of the court upon the issues of fact in said cause, but not thereafter, unless the time for signing said Bills of Exception shall have been previously extended by order of court or by written consent of parties.

If this rule had the effect of extending the term at which the verdict was rendered, it extended it until thirty days from February 19, 1931, or until March 21, 1931. (*Glickstein* v. *United States*, 215 Fed. 90 (C. C. A. 2d), but see *Jennings* v. *Phil., Balt. & Wash. Ry Co.*, 218 U. S. 255, 256.) On March 19,

1931, the District Judge entered an order extending the time for the filing of the bill of exceptions for a period of thirty days from the date thereof. (R. 8.) A day before this thirty-day period expired, or on April 17, 1931, the District Judge made another similar order. This order bears the notation that it was filed on April 17, 1931, and is headed "Order of court extending time for filing bill of exceptions to 17th May, 1931." (R. 9.) The thirtieth day, as stated in this heading, expired May 17, 1931, but the bill of exceptions was not signed or filed until May 18, 1931. (R. 9, 19.) In *Exporters* v. *Butterworth-Judson Co.*, 258 U. S. 365, 368, this Court said:

> In the recent case of *O'Connell* v. *United States*, 253 U. S. 142, 146, we reaffirmed the doctrine announced in *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293, 298—
>
> "By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term had expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error

> has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end."

The bill of exceptions in the instant case was, therefore, clearly out of time unless some of the exceptions announced by this Court are applicable. We do not believe that the instant case falls within any of those exceptions.

It is true that following the bill of exceptions there is a notation, in the usual form, "This Bill of Exceptions is agreed upon," and that this notation was signed by the United States Attorney and his assistant. This notation obviously constitutes nothing more than a statement by the United States Attorney that the bill satisfied him as to form and substance. But even if it were susceptible of the construction that it constituted a consent to the filing of the bill subsequent to the extended period, it must, to have validity, appear that it was given prior to the expiration of such period, for, otherwise, jurisdiction over the cause has been lost. *Waldron* v. *Waldron,* 156 U. S. 361; *Exporters* v. *Butterworth-Judson Co., supra.* The record does not show that it was given prior to the expiration of the extended period. Indeed, if the date mark "5/18/31" applies to it, as appears likely, the record shows affirmatively that it was given after such period.

The record is barren of anything which would indicate that the United States Attorney through any act or omission of his induced or misled petitioner into presenting or filing the bill out of time. He was not bound to keep petitioner informed in the matter, and his mere silence, clearly can not be construed as an estoppel. See *Jennings* v. *Phil., Balt. & Wash. Ry. Co.,* 218 U. S. 255, 258, *supra.*

Likewise, there is nothing in the record to indicate that the bill was presented during the extended period but not signed or filed until afterwards because of some "extraordinary circumstance."

In a matter such as this, involving the jurisdiction of a Federal court to do a particular act, the burden is, of course, upon the one seeking to support its jurisdiction. In the instant case the record presented is devoid of the necessary jurisdictional facts.

The last day of the extended period expired on Sunday, May 17, 1931. The bill was not signed or filed until Monday May 18, 1931. The fact that the period expired on a Sunday did not, we submit, operate to permit the signing and filing of the bill on the following day. As was stated in *Maresca* v. *United States,* 277 Fed. 727, 733 (C. C. A. 2d), in which this Court denied certiorari (257 U. S. 657):

> We see no reason why the rule this court applied in determining the time within which an appeal or a writ of error can be sued out should not be also applied in determining the time within which the bill of

exceptions can be signed and filed. The right to the bill of exceptions, in a criminal case in the federal courts, like the right to a writ of error, comes from the statute, and not from any rule of the court, and we know of no reason why it is not governed by the same principles in ascertaining the time within which it is to be signed. If, when the last day falls on Sunday or on a legal holiday, the appeal or writ of error can not be filed on the next day under the like circumstances, the bill of exceptions can not be signed or filed on the next day. It must follow that, whether the court below extended the term, as the government contends, to November 1st, or whether it extended it four months and to November 2d, which fell on a legal holiday, in either event the subsequent extension of the term not made until the following day came too late, and the bill of exceptions thereafter signed must be disregarded. *Blisse* v. *United States* (C. C. A.) 263 Fed. 961; *Anderson* v. *United States* (C. C. A.) 269 Fed. 65.

This case has the support of numerous other decisions involving situations similar in character. See also *Gotham Can Co.* v. *United States,* 281 U. S. 706; *Northwestern Public Service Co.* v. *Pfeiffer,* 36 F. (2d) 5 (C. C. A. 8th); *Huntt* v. *Brightwood Sanitorium Co.,* 288 Fed. 272 (App. D. C.); *Covey* v. *Williamson,* 286 Fed. 459 (App. D. C.); *Siegelschiffer* v. *Penn Mutual Life Ins. Co.,* 248 Fed. 226 (C. C. A. 2d), 246 U. S. 654; *Meyer* v. *Hot Springs*

Imp. Co., 169 Fed. 628 (C. C. A. 9th); *Johnson* v. *Meyers*, 54 Fed. 417 (C. C. A. 8th). See also *In re Antonen*, 293 Fed. 473 (D. Ore.); *Hermann* v. *United States*, 66 Fed. 721 (S. D. N. Y.); *Shefer* v. *Magone*, 47 Fed. 872 (S. D. N. Y.).

CONCLUSION

For the reasons stated above, we submit that the petition should be denied.

Respectfully submitted.

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